

Court of Appeal Case No. D052391

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

ROBERT PARKER

Plaintiff and Appellant

vs.

MARK KALISH, M.D.

Defendant and Respondent

Appeal from San Diego County Superior Court
Case No. 37-2007-00067254-CU-PO-CTL
Honorable Luis R. Vargas, Judge Presiding

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	PAGE
I. <u>INTRODUCTION</u>	1
II. <u>STATEMENT OF THE CASE</u>	1
III. <u>STANDARD OF REVIEW</u>	4
IV. <u>LEGAL ARGUMENT</u>	4
A. <u>Dr. KALISH met his burden by establishing that the Complaint arose from protected activity.</u>	4
B. <u>The order striking the complaint should be affirmed because Appellant failed to demonstrate a probability of success on the merits.</u>	15
1. <i>Third Cause of Action for Medical Malpractice.</i>	19
2. <i>Second Cause of Action for Intentional Infliction of Emotional Distress.</i>	20
3. <i>First Cause of Action for Fraud.</i>	23
4. <i>Fourth Cause of Action for Breach of Contract.</i>	25
5. <i>The Fifth Cause of Action for Tortious Violation of Medical Privacy.</i>	26
V. <u>CONCLUSION</u>	27
CERTIFICATE OF WORD COUNT	29

TABLE OF AUTHORITIES

STATUTES:	PAGE
<i>Civil Code</i> § 47(b)	3, 6, 17
<i>Code of Civil Procedure</i> § 425.16	2,4,6-9-10,15,27
<i>Code of Civil Procedure</i> § 2032.610(a)	27
 CASES:	
<i>Adams v. Superior Court</i> 2 Cal.App.4th 512, 529 (1992)	17
<i>Blackburn v. Brady</i> 116 Cal.App.4th 670, 676 (2004)	4, 7, 9
<i>Bushling v. Fremont Medical Center</i> 117 Cal.App.4th 493, 509 (2004)	19
<i>Cervantez v. J. C. Penny Co.</i> 24 Cal.3d 579, 593 (1979)	21
<i>City of Cotati v. Cashman</i> 29 Cal.4th 69, 79 (2002)	4, 5
<i>City of Santa Monica v. Stewart</i> 126 Cal.App.4th 43, 80 (2005)	4, 18
<i>Cochran v. Cochran</i> 65 Cal.App.4th 488, 496 (1998)	23
<i>Computer XPress, Inc. v. Jackson</i> 93 Cal.App.4th 993, 1001 (2001)	5
<i>Delfino v. Agilent Technologies, Inc.</i> 145 Cal.App.4th 790, 809 (2006)	21
<i>Drum v. Bleau, Fox & Assocs.</i> 107 Cal.App.4th 1009 (2003)	18
<i>Estate of Nicholas</i> 177 Cal.App.3d 1071, 1090 (1986)	20
<i>Equilon Enterprises v. Consumer Cause, Inc.</i> 29 Cal.4th 53, 67 (2002)	4
<i>Felton v. Schaeffer</i> 229 Cal.App.3d 229 (1991)	10, 12, 14, 20

TABLE OF AUTHORITIES

CASES (continued):	PAGE
<i>Gootee v. Lightner</i> 224 Cal.App.3d 587 (1990)	9, 10
<i>Greenberg v. Perkins</i> 845 P.2d 530 (1993)	11
<i>Harris v. Kreutzer</i> 271 Va. 188 (2006)	11, 12, 22
<i>Huffman v. Lindquist</i> 37 Cal.2d 465, 474 (1951)	19
<i>Keene v. Wiggins</i> 69 Cal.App.3d 308, 313 (1977)	12, 20
<i>Martinez v. Metabolife International, Inc.</i> 113 Cal.App.4th 181, 188 (2003)	8
<i>McKinney v. Nash</i> 120 Cal.App.3d 428, 442 (1981)	26
<i>Mero v. Sadoff</i> 31 Cal.App.4th 1466 (1995)	11, 12, 14
<i>Molko v. Holy Spirit Assn.</i> 46 Cal.3d 1092, 1122 (1988)	22
<i>Paul v. Friedman</i> 95 Cal.App.4th 853 (2002)	6, 7, 9
<i>Paul for Counsel v. Hanyecz</i> 85 Cal.App.4th 1356, 1365, fn.4 (2001)	15, 16
<i>People ex rel. 20th Century Insurance Co. v. Building Permit Consultants, Inc.</i> 86 Cal.App.4th 280, 282 (2000)	5, 6, 7
<i>Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, LLP</i> 133 Cal.App.4th 658, 669-70, 672 (2005) ...	8, 9
<i>Rusheen v. Cohen, supra</i> , 37 Cal.4th 1048, 1056 (2006)	12, 14, 15
<i>Silberg v. Anderson, supra</i> , 50 Cal.3d 205, 212 (1990)	9-10, 12, 17
<i>Smith v. Welch</i> 265 Kan. 868 (1998)	12

TABLE OF AUTHORITIES

CASES (continued):	PAGE
<i>South Tahoe Gas Co. v. Hofmann Land Improvement Co., Inc.</i> 25 Cal.App.3d 750, 765 (1972)	24
<i>Taus v. Loftus</i> 40 Cal.4th 683, 714 (2007)	15
<i>Walsh v. West Valley Mission Com. College Dist.</i> 66 Cal.App.4th 1532, 1545 (1998)	26
 OTHER AUTHORITIES:	
<i>California Practice Guide: Personal Injury</i> (Rutter Group)	14

I. INTRODUCTION

This is an appeal of the lower court's granting of an anti-SLAPP motion filed by Respondent and defendant, MARK KALISH, M.D. Respondent's motion challenged the propriety of Appellant's action for damages which he allegedly suffered as a result of a defense psychiatric examination performed by Respondent in connection with an underlying civil suit brought by Appellant against his neighbors. The lower court found that Dr. KALISH was immune from liability under the litigation privilege provided by *Civil Code* section 47.

Notwithstanding Appellant's nuanced and novel approach in attempting to characterize the underlying facts, in reality this case turns upon well-settled principles of law which afford absolute immunity, and insulate Respondent from any damages claimed by Appellant in connection with the defense psychiatric examination in question. Given the weight of authority against him, Appellant seeks to distinguish his case by contending that the psychological injuries he suffered resulted from conduct on the part of Respondent which was outside that normally anticipated in connection with a defense psychiatric examination, thereby precluding immunity.

Despite Appellant's characterization, or mischaracterization, of the underlying facts, he is unable to explain why the reasons for immunity which cloak a physician performing a defense psychiatric examination should not apply in this case.

II. STATEMENT OF THE CASE

In May 2004, Appellant filed a lawsuit against his neighbors, who were tenants in a house owned by one Lauren Hunter, also a named defendant in the action (CT 0037, ¶¶ 10-12). The complaint in that action (hereinafter "underlying action") alleged nuisance and related causes of

action seeking to redress damages resulting from the loud and objectionable conduct carried on by the defendant tenants. Because Appellant claimed psychological injuries and emotional distress in the underlying action (CT 0002, ¶ 3; 0043, ¶¶ 2-3), Appellant underwent a defense psychological examination which was performed by Respondent on May 24, 2005 (CT 0002, ¶¶ 5-6). At no time did a physician-patient relationship exist between Respondent and Appellant (CT 0032, ¶ 9).

Ultimately the underlying lawsuit was resolved, and subsequently dismissed [OB 8].

On May 24, 2007, Appellant filed the subject action against Respondent, alleging fraud, intentional infliction of emotional distress, medical malpractice, breach of contract and tortious violation of medical privacy (CT 0015, lines 23-28).

On October 10, 2007, Respondent filed a special motion to strike the complaint pursuant to *Code of Civil Procedure* section 425.16(c) (CT 0009). Respondent's motion was based upon the following grounds: The conduct complained of constituted protective activity; and plaintiff was unable to establish the probability of success on the merits (CT 0009-0022). Respondent's motion was supported by several declarations, including exhibits (CT 0009-0034). Among the declarations in support was one authored by Alan K. Brubaker, counsel for Respondent at the time (CT 0026-28). In his declaration, Mr. Brubaker stated that Dr. KALISH had initially been contacted with respect to the underlying litigation by attorney Greg Konoske, counsel for one of the other defendants in the action, intending to retain Dr. KALISH as an expert witness (CT 0027, ¶ 3). However, prior to the time Dr. KALISH performed the psychiatric evaluation of Appellant at the request of Mr. Brubaker's client, Lauren

Hunter, Mr. Konoske's client settled out of the case, and Mr. Brubaker thereafter retained Dr. KALISH as an expert witness in the case (CT 0027, ¶ 4).

Appellant's opposition to Respondent's motion consisted of a four-page memorandum (CT 0083-0086), his six-page declaration (CT 0087-0092), and a notice of lodgment (CT 0080-0082).¹

On November 2, 2007 the court heard Respondent's motion. Prior to the hearing, the court issued its tentative ruling to grant the motion (CT 0106). After hearing argument by the parties, the court confirmed its tentative ruling granting the anti-SLAPP motion (CT 0103). The court found that the moving party met his burden to demonstrate that the acts of which plaintiff complained were taken "in furtherance of the [defendant] 's right of petition or free speech under the United States or California Constitution in connection with a public issue" as defined in the anti-SLAPP statute (CT 0106).

The trial court found that the allegations in the complaint arose out of Dr. KALISH's statements made during, or related to, the subject psychiatric examination undertaken for the purposes of the underlying litigation. As such, the court concluded that Dr. KALISH's statements made during the psychiatric examination constituted "protected activity" (CT 0106). The trial court also found that Appellant had failed to show a probability of success on the merits because Dr. KALISH's statements were protected by the litigation privilege afforded by *Civil Code* Section 47(b) (CT 0107). Therefore, the court found that Appellant had failed to meet his burden of establishing a probability of success on the merits. *Id.*

The record only contains Appellant's Notice of Lodgment. None of the exhibits thereto were submitted for the court's review.

III. STANDARD OF REVIEW

The standard of review with respect to a ruling on an anti-SLAPP motion is *de novo*. *Blackburn v. Brady* 116 Cal.App.4th 670, 676 (2004). Furthermore, the issue of whether *Code of Civil Procedure* § 425.16² applies is a legal question, subject to the same *de novo* standard of review on appeal. *Id.* The appellate court only reviews "the trial court's ruling, not its rationale." *City of Santa Monica v. Stewart* 126 Cal.App.4th 43, 80 (2005).

Section 425.16 subdivision (b)(1), requires a court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken "in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute. If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. *Equilon Enterprises v. Consumer Cause, Inc.* 29 Cal.4th 53, 67 (2002).

IV. LEGAL ARGUMENT

A. Dr. KALISH met his burden by establishing that the Complaint arose from protected activity.

The first step in the anti-SLAPP calculus is to determine whether the lawsuit arises from protected activity. In *City of Cotati v. Cashman* 29 Cal.4th 69, 79 (2002) the court held that: "In deciding whether the 'arising

² All Code references are to the *Code of Civil Procedure* unless otherwise specified.

from' requirement is met, a court considers 'the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'"

As the *City of Cotati* court stated the issue: "In short, the statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." *Id.* at 78; emphasis in original; *See also ComputerXpress, Inc. v. Jackson* 93 Cal.App.4th 993, 1001 (2001).

Examples of cases demonstrating the correctness of the lower court's decision in the instant case are many. At the outset, however, a discussion of several cases holding that the first step in the anti-SLAPP analysis was found to be lacking may be illustrative. For example, in *People ex rel. 20th Century Insurance Co v. Building Permit Consultants, Inc.* 86 Cal.App.4th 280, 282 (2000) the complaint alleged that the defendants engaged in a scheme to defraud insurance companies out of the proceeds following the Northridge earthquake. The complaint alleged the defendants prepared various reports for homeowners to file false and fraudulent claims with the insurance companies.

The defendants in that case filed an anti-SLAPP motion arguing that "their right to petition is implicated by the allegation that they prepared and used false and fraudulent damage reports and repair estimates." *Id.* at 284. The defendants contended that the reports were prepared in anticipation of litigation and became a subject of discovery in the lawsuit following the denial of the claims. The appellate court held that the defendant's reports did not arise from protected activity. The court noted:

While some of the reports eventually were used

in official proceedings or litigation, they were not created 'before' or 'in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.' [*Id.* at 284-85].

The court held that the defendants' reports were sent to the insurance company to demand performance on the insurance contract, and at the time defendants created and submitted their reports and claims, there was no "issue under consideration" pending before any official proceeding. *Id.* at 285.

A year after *20th Century*, the case of *Paul v. Friedman* 95 Cal.App.4th 853 (2002) was decided. In that case, a securities broker brought an action against an attorney who had represented eleven of the broker's former clients prior to an arbitration in which the clients sought damages from the broker for securities law violations, fraud and negligence. The broker alleged that the attorney breached a confidentiality agreement and made improper disclosures of private facts uncovered in investigation. The defendant attorney made a motion under section 425.16 on the grounds that the cause of action arose from acts in furtherance of free speech or petition rights. The trial court granted the motion as to some of the causes of action, but denied it as to others. The appellate court reversed the trial court's order as relating to the granting of the motion to strike. The court held that the underlying suit did not arise from statements made before the arbitral body, and consequently were not made in connection with an issue under consideration or review in the arbitration.

The *Paul* court discussed the *20th Century* holding, noting that: "In

20th Century Insurance there was a connection to an issue but no pending proceeding; here, there is a pending proceeding, but no connection to an issue before the tribunal." 95 Cal.App.4th at 867.

In *Blackburn v. Brady* 116 Cal.App.4th 670 (2004) this court followed the rationale of *20th Century* and *Paul*. There, the plaintiff sued a bidder for statements made at a sheriff's sale of property. The gravamen of the plaintiffs third cause of action was fraud allegedly committed by another bidder at the auction. The defendant moved to strike the complaint under the anti-SLAPP statute, and the trial court denied the motion. This court affirmed the lower court's ruling, holding that the conduct of bidding on real property at a sheriff's auction was purely a business type event that was not protected activity contemplated under section 425.16(e). 116 Cal. App.4th at 676-77.

In contrast to *20th Century*, *Paul* and *Blackburn*, both elements of the "arising out of" equation are satisfied in the instant case. Appellant filed his lawsuit on May 7, 2004, seeking damages for emotional distress (CT 0036-0044). In fact, the trial court noted in the underlying *Behrouzi* case, that Plaintiff had tendered the issue of emotional distress by the allegations of the complaint, and his continuing allegations thereafter (CT 0056).

Appellant acknowledges that the "first prong of the anti-SLAPP inquiry. . . is assuredly satisfied when an examinee sues an examiner for submitting testimony for a recommendation to a court, as the defendant in such settings is being sued based upon the exercise of his right to testify truthfully" (OB 31). However, Appellant contends that Dr. KALISH "is not being sued for any petition *he* filed or any testimony *he* provided; rather, he is being sued based upon conduct he performed, and these acts were (at best) performed in support of the right of (someone else) (e.g., *Hunter*

and/or *Behrouzi*) to petition a court for redress. *Id.*

The record belies Appellant's position in that regard. His complaint repeatedly makes reference to statements presented relating to the examination by Dr. KALISH, Dr. KALISH's communication about the preparation for the mental examination, the results of the mental examination, and Dr. KALISH's ultimate conclusions (CT 0003, ¶ 19; 0005, ¶¶ 27 and 28; 0006, ¶¶ 32-34; 0007, ¶¶ 40 and 41). Thus, whether or not the examination also involved other, incidental conduct on the part of Dr. KALISH, there can be no doubt that the examination involved conduct which satisfies the first prong of the anti-SLAPP statute.

As noted by the court in *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton*, LLP 133 Cal.App.4th 658, 672 (2005):

The apparently unanimous conclusion of published appellate cases is that 'where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct.'

In determining whether the anti-SLAPP statute applies, the court must examine the principle thrust or gravamen of plaintiff's cause of action. The anti-SLAPP statute will be seen to be inapplicable only if the arguably protected activity is only incidental to a cause of action which is based essentially on non-protected activity. In such a case, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute. *Martinez v. Metabolife International, Inc.* 113 Cal.App.4th 181, 188 (2003).

On the other hand, where the statements or writings in question

occur in connection with an issue under consideration or review in the proceeding, section 425.16 will be seen as applicable. *Blackburn v. Brady, supra*, 116 Cal.App.4th at 677; *Paul v. Friedman, supra*, 95 Cal.App.4th at 866.

The trial court is required to focus upon the substance of plaintiffs lawsuit in analyzing the "first prong" of the special motion to strike. *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, LLC, supra*, 133 Cal.App.4th 658, 669-70 (2005).

Despite Appellant's attempts to emphasize conduct on the part of Dr. KALISH which was incidental to the mental examination in question, there is little doubt that Appellant's causes of action allege conduct on the part of Dr. KALISH relating to the mental examination which was ordered by a lower court, and which was in fact conducted by Dr. KALISH at the request of a defendant in the underlying action. Appellant urges the court to hold that any speech by a medical examiner during an examination which is not directly incident to the examination is, by definition, not protected speech. No authority exists for such a proposition, however, and such a rule would turn section 425.16 on its head. In fact, as indicated above, ample authority exists for holding that incidental conduct or statements made in connection with otherwise protected activity are likewise protected.

Appellant endeavors in vain to distinguish this case from *Silberg v. Anderson* 50 Cal.3d 205 (1990) and *Gootee v. Lightner* 224 Cal.App.3d 587 (1990) cited by Respondent in support of his anti-SLAPP motion. His rationale for doing so is based, however, upon his erroneous assertion that the conduct by Dr. KALISH of which he complains constitute activities "wholly apart" from those associated with a mental examination (OB 16). As indicated previously, the alleged conduct and statements of Respondent

during the examination were merely incidental to the examination, and constituted protected activities.

Furthermore, the factual distinctions which Appellant attempts to raise between this case and those relied upon by Respondent in the lower court do not support his conclusion that Respondent failed to meet his burden under section 425.16. For example, Appellant asserts that Respondent's statements and conduct at the examination would not have been part of any trial testimony which he offered at trial, thus distinguishing this case from *Silberg* and *Gootee* (OB 15-17). However, he fails to explain why such a distinction should be of importance here. It is the protection against being subjected to litigation for exercising ones right of free speech which section 425.16 is intended to promote. Furthermore, the *Gootee* court held that the litigation privilege applies, not only to judicial proceedings, but also to matters preparatory to judicial proceedings. 224 Cal.App.3d at 594; *Briggs v. Eden Council for Hope & Opportunity* 19 Cal.4th 1106 (1999).

Appellant also attempts to "bootstrap" around the lack of merit in his case by relying upon cases holding that a physician conducting an independent medical examination is liable to the examinee for injuries sustained during the examination (OB 20-28). For instance, Appellant cites *Felton v. Schaeffer* 229 Cal.App.3d 229 (1991) involving a pre-employment physical examination of a prospective employee by a physician hired by the employer. The employee sued the physician for diagnosing a condition the employee did not have, resulting in loss of the job. The holding in the case was that no physician-patient relationship was created under such facts, and therefore, the physician was not liable for the loss of employment. The court's opinion does contain *dicta* that a physician under such

circumstances could be liable for injuries he caused during the examination, although no such injuries were involved under the facts of the case.

The case of *Mero v. Sadoff* 31 Cal.App.4th 1466 (1995), also cited by Appellant, does hold that a physician performing an independent medical exam has a limited duty to avoid causing physical injury to the examinee during the exam. However, the duty relates only to avoidance of physical injuries. No California case has held that a physician conducting a court ordered mental examination can be held liable for emotional distress allegedly resulting from his communications with the examinee during the exam. Certainly, Appellant has cited no California authority so holding.

Instead, Appellant seeks to rely on three cases from foreign jurisdictions. These cases, however, are easily distinguishable from the instant one, and, in fact, support Respondent's position in some respects.

Appellant cites the Colorado case of *Greenberg v. Perkins* 845 P.2d 530 (1993) holding that a plaintiff who underwent a defense medical examination could sue the examining doctor who allegedly caused additional injuries by conducting a functional capacity test which placed physical stresses upon her body.

Appellant also cites the Virginia case of *Harris v. Kreutzer* 271 Va. 188 (2006) involving a personal injury suit in which the plaintiff underwent a mental examination to evaluate her alleged psychological injuries sustained in the accident. Plaintiff later sued the psychologist who performed the examination, contending that he had verbally abused her, raised his voice at her, caused her to break down into tears, and accused her of being a malingerer. The Virginia Supreme Court held that plaintiff could sue the psychologist for the emotional injuries she suffered during the examination. However, several distinguishing factors exist which make

the case inapplicable to the instant one.

First, the court relied upon Virginia law holding that an independent medical examiner impliedly consents to the existence of a physician-patient relationship, and that the examination constitutes "health care." *Id.* At 199-200. No such presumptions are made in California. In fact, the authorities are uniform to the contrary. *See, e.g., Keene v. Wiggins* 69 Cal.App.3d 308 (1977).

It is clear from a reading of the *Harris* court's opinion, that the State of Virginia has chosen to adopt much broader rules relating to the liability of physicians conducting independent medical examinations than have the courts in California. No reported case in California has held a physician liable for emotional injuries suffered by an examinee as a result of verbal communications by the examiner.

The final foreign jurisdiction case cited by Appellant is *Smith v. Welch* 265 Kan. 868 (1998) which involved an independent medical examination in which the examiner allegedly asked the examinee personal questions about her sexual experience, and fondled her breasts. As with the other cited cases along this line, *Smith* is distinguishable. It involves an unauthorized touching of the examinee, and it is unclear to what extent the touching formed the basis of the court's holding. Furthermore, as with the *Harris* case, *Smith* represents an expansion of the rules beyond the holdings in California.

Any perceived conflict between the rules of law enunciated in *Silberg* and other cases supporting Respondent's position, and the *Felton* and *Mero* cases cited by Appellant in the Opening Brief, is readily reconcilable. In *Rusheen v. Cohen* 37 Cal.4th 1048 (2006), a case relied upon by Appellant (OB 14), an attorney obtained a default judgment, and

proceeded to pursue enforcement of the judgment against the defendant. Defendant cross-complained for abuse of process, and the attorney filed an anti-SLAPP motion, asserting that his actions were protected by the litigation privilege. The trial court granted the motion and struck the defendant's cross-complaint. The court of appeal reversed, and the California Supreme Court granted review.

The court reversed the court of appeal, holding that the attorney's acts in obtaining the judgment constituted privileged conduct, extending the privilege to his acts of attempting to enforce the judgment. The holding was based upon a distinction drawn by the court between "communicative" acts and "noncommunicative" acts. The court noted that the litigation privilege "is now held applicable to any communication, whether or not it amounts to a publication [citations], and all torts except malicious prosecution." *Id.* at 1057. The court reasoned that:

[The privilege] applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. . . .

Because the litigation privilege protects *only publications and communications*, a 'threshold issue in determining the applicability' of the privilege is whether the defendant's conduct was communicative or noncommunicative. [*Id.* at 1057-58; emphasis added].

Holding that the distinction between communicative and

noncommunicative conduct hinges on the gravamen of the action, the court found that the attorney's acts of litigating the case and obtaining a judgment constituted communicative conduct which was absolutely privileged. The court further reasoned that the acts of enforcing the judgment, having resulted from obtaining it, were likewise protected by the privilege.

The holding in *Rusheen* explains the reason why the courts in *Felton* and *Mero* allowed plaintiffs to sue the physicians for the physical injuries sustained during the medical examinations. The injuries resulted from the act of examination, which constitutes "noncommunicative" conduct not subject to the litigation privilege. These holdings are not inconsistent with the instant case because the alleged injuries here resulted from "communicative" conduct.

Finally, even assuming Appellant is correct that California allows recovery against a physician hired to conduct an independent mental examination of a plaintiff in civil litigation, such a rule of law would not be applicable in this case. Plaintiff cites several cases, including *Felton* and *Mero*, as well as *California Practice Guide: Personal Injury* (Rutter Group), concerning a physician's liability for injuries sustained by a plaintiff in connection with an independent medical examination (OB 20-23). The cited authorities clearly provide that liability in such cases is based upon a "negligently-performed examination" (OB 22). These cases and authorities cited by plaintiff involve situations where a plaintiff sustained physical injury as a result of the negligence of the examiner in performing the examination. Although there are no reported cases or other authorities ascribing liability to a physician conducting a mental examination, even if there were, such authorities would be inapplicable to this case.

In this case, none of the conduct in which respondent allegedly

engaged during the examination, or afterward, could reasonably be considered a "negligently-performed examination." The conduct about which plaintiff complains in this action involved allegedly inappropriate statements made by Dr. KALISH during the examination, and the doctor's disclosure of details concerning the examination, afterward (CT, 0003-0004, 0007).

The purpose of the mental examination in the underlying case was to evaluate the issue of plaintiff's emotional distress which he had claimed resulted from the defendant's conduct (CT 0106). Nowhere does Appellant allege any facts indicating that the examination was negligently performed, or even that any of Dr. KALISH's opinions or reports resulted from his negligence. Thus, there is no basis for a finding of liability under the facts alleged by Appellant.

Clearly, the acts which are alleged to have caused Mr. PARKER'S emotional distress are protected under the litigation privilege, and Respondent's motion was properly granted by the trial court.

B. The order striking the complaint should be affirmed because Appellant failed to demonstrate a probability of success on the merits.

Once the court finds that a defendant has made the threshold showing necessary under section 425.16, it must determine whether the plaintiff has demonstrated a probability of prevailing on the claim. *Rusheen v. Cohen, supra*, 37 Cal.4th 1048, 1056 (2006). To satisfy his burden, Appellant in this case must "demonstrate both that the claim is legally sufficient and that there is sufficient evidence to establish a prima facie case with respect to the claim." *Taus v. Loftus* 40 Cal.4th 683, 714 (2007). He may not simply rely on the allegations of his complaint alone. *Paul for*

Counsel v. Hanyecz 85 Cal.App.4th 1356, 1365, fn.5 (2001) (disapproved on other grounds).

Appellant's complaint in the underlying action alleged five causes of action: fraud; intentional infliction of emotional distress; medical malpractice; breach of contract; and tortious violation of medical privacy (CT 0001). All five causes of action were based upon the fact that Dr. KALISH was retained by the defense in the underlying action to act as an expert witness. In his anti-SLAPP motion below, Respondent argued that his conduct as alleged in all five of the causes of action constituted protected activity, for which Dr. KALISH enjoyed absolute immunity under *Civil Code* Section 47(b) (CT 0012, lines 10-26). Every allegation made by Appellant in his complaint involved events and occurrences which took place in connection with the mental examination, and Appellant does not contend otherwise.

In his anti-SLAPP motion, Respondent presented argument, supported by legal authority, that Appellant could not satisfy the requirement of probable success on the merits (CT 0018-0020). Respondent addressed each of Appellant's allegations which supposedly caused him mental distress: false statements by Dr. KALISH that he had been retained by defendant Behrouzi in the underlying litigation (CT 0002, ¶ 10); that Dr. KALISH carelessly and unprofessionally conducted the mental examination (CT 0003, ¶ 19; 0004, ¶ 20; 0005, ¶ 27; 0006, ¶¶ 33 and 34) and that Dr. KALISH illegally and falsely stated details of the mental examination to attorney Brubaker (CT 0007, ¶ 40). Each of the actions allegedly committed by Dr. KALISH was absolutely privileged under *Civil Code* Section 47(b).

The law in California is clear that the litigation privilege is an

absolute defense to all communication and all torts, except malicious prosecution. In *Silberg v. Anderson, supra*, 50 Cal.3d 205, 212 (1990) the court held:

The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

It has also been held that the litigation privilege is to be construed broadly, and "any doubt as to whether the privilege applies is resolved in favor of applying it." *Adams v. Superior Court* 2 Cal.App.4th 521, 529 (1992).

In the instant case, all four of the tests enunciated by the *Silberg* court were present. The defendants in a judicial proceeding were entitled to a mental examination, and the court in fact ordered one pursuant to the *Code of Civil Procedure*. Since Appellant's mental state was held by the court to be in issue, the mental examination obviously had a relationship to the action, and was intended to achieve the objects of the litigation. Dr. KALISH, a defense expert, certainly qualified as one protected by the litigation privilege.

On the other hand, Appellant in the Opening Brief attempts in vain to persuade the court that Appellant failed to establish in the lower court that his conduct was absolutely privileged under *Civil Code* § 47(b). His arguments in that regard are weak and unpersuasive.

First, Appellant finds it significant that Respondent failed in

connection with the anti-SLAPP motion to deny the allegations that he had engaged in "abusive and unprofessional" behavior, failed to treat Respondent with "dignity," and exhibited displays of "disparagement, inattention, and hostility" toward Mr. PARKER (OB 13). These contentions are irrelevant since Respondent was not required to deny or prove them false. Respondent proceeded in the lower court upon the position that, even if Respondent's contentions were true, the conduct was absolutely privileged.

Respondent also suggests that the lower court erred by basing its decision only upon the case of *Drum v. Bleau, Fox & Assocs.* 107 Cal.App.4th 1009 (2003). However, this too is irrelevant because as Appellant, himself, points out, review of an anti-SLAPP motion is *de novo* (OB 9). The appellate court reviews only the trial court's ruling, not its rationale. *City of Santa Monica v. Stewart, supra*, 126 Cal.App.4th 43, 80 (2005).

Appellant's opposition to Respondent's anti-SLAPP motion (CT 0083) failed to establish the probability of success on the merits as to any of the causes of action alleged in the complaint. As indicated previously, all of Appellant's allegations regarding Dr. KALISH's conduct and actions during and after the mental examination related to the examination, itself. Since the examination was proper under the law, and had been ordered by the court in the underlying action, it is clear that all statements made during the mental examination fall under the litigation privilege, and Dr. KALISH is immune from liability.

Respondent met his burden in the lower court with regard to the requirements necessary for application of the anti-SLAPP statute. Appellant's opposition to the motion, however, did not establish the

probability of success on the merits. None of the "evidence" offered by Appellant in opposition to the motion tended to establish that Appellant was likely to prevail on the merits as to any of the causes of action alleged in his complaint.

Moreover, he has failed to file with this court the exhibits detailed in the declaration he filed in opposition to Respondent's motion, and he offers no explanation as to the application of any of those exhibits to the issues on appeal. In fact, Appellant in his Opening Brief has chosen to ignore the issue of whether he could prevail on the merits, seeking only to challenge the issue of Respondent's purported lack of immunity.

It is clear that Appellant did not, and could not, demonstrate the probability of success as to any of the five causes of action.

1. *Third Cause of Action for Medical Malpractice.*

Although this is Appellant's third cause of action, the Opening Brief appears to assert that the crux of the case against Dr. KALISH falls under the malpractice allegations. However, Appellant failed to offer any evidence tending to establish the probability of success with regard to his medical malpractice claim. Negligence on the part of a physician or surgeon will not be presumed, and it must be affirmatively proved by way of expert testimony. *Huffman v. Lindquist* 37 Cal.2d 465, 474 (1951). A claim of medical malpractice must also be supported by expert testimony that injury was, to a reasonable degree of medical probability, caused as a result of the conduct of the physician. *Bushling v. Freemont Medical Center* 117 Cal.App.4th 493, 509 (2004).

In this case, the record is utterly devoid of any expert witness testimony demonstrating that Dr. KALISH's conduct fell below the standard

of care, or was a legal cause of any claimed injury.

More important, however, is the fact that Respondent lacked standing to assert a cause of action for medical malpractice. That is because no physician-patient relationship existed between Respondent and Dr. KALISH. In order to maintain a claim for medical malpractice, a plaintiff must prove the physician breached a duty of due care. Such a duty is created by virtue of the physician-patient relationship.

The law in California provides that when a physician examines an individual for purposes other than medical treatment, no physician-patient relationship is created. In *Keene v. Wiggins*, supra, 69 Cal.App.3d 308, 313 (1977) the court held that no physician-patient relationship and resultant duty of care arises when a physician examines a person solely for the purpose of making a report to a worker's compensation insurer, and does not offer or intend to treat the person examined.

Similarly, where a physician examines a job applicant at the request of a prospective employer, no physician-patient relationship is created; and the physician is not liable to the applicant for a misdiagnosis which resulted in a lost job opportunity. *Felton v. Schaeffer*, supra, 229 Cal.App.3d 229, 234-35, 38 (1991).

Furthermore, unsupported statements in the Opening Brief are simply not a valid substitute for proper evidence. *Estate of Nicholas* 177 Cal.App.3d 1071, 1090 (1986).

Accordingly, Appellant failed to demonstrate the probability of success on the merits with regard to the medical malpractice claim.

**2. Second Cause of Action for Intentional
Infliction of Emotional Distress.**

The elements of the tort of intentional infliction of emotional distress

are: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiffs suffering severe or extreme emotional distress; and (3) and actual and proximate causation of the emotional distress by the defendant's outrageous conduct. *Cervantez v. J. C. Penny Co.* 24 Cal.3d 579, 593 (1979).

According to Appellant's declaration filed in support of his opposition to the motion below, Dr. KALISH allegedly undertook the following actions: (1) Dr. KALISH stood with his back to Appellant while making certain statements to him (CT 0089, ¶ 16); (2) Dr. KALISH told Mr. PARKER "I've been asked to do a psychiatric evaluation by the attorneys representing the people that you're suing" (CT 0089, ¶ 17); (3) Dr. KALISH called Appellant "Mr. Yogurs" at the beginning of the examination (CT 0090, ¶ 21); (4) Dr. KALISH interrupted Appellant twice during the testing portion of the examination to dictate his availability for deposition and to notice Mr. PARKER of the pre-payment for the deposition (CT 0090, ¶ 24); and (5) Dr. KALISH became upset because Appellant's foot was touching a newly painted wall, and pointed it out to Mr. PARKER (CT 0090, ¶ 24).

This conduct is insufficient to establish a prima facie case for intentional infliction of emotional distress. In fact, such conduct does not rise to the level of being even particularly offensive. Even if Mr. PARKER found it to be so, however, the conduct was not of a type which would support a claim for intentional infliction of emotional distress.

In *Delfino v. Agilent Technologies, Inc.* 145 Cal.App.4th 790, 809 (2006), the court held that "It is established that '[o]rdinarily mere insulting language, without more, does not constitute outrageous conduct.'" It is

clear that liability based upon intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. *Molko v. Holy Spirit Assn.* 46 Cal.3d 1092, 1122 (1988); (Superceded by statute on other grounds).

The case of *Harris v. Kreutzer, supra*, 271 Va. 188 (2006), cited by Appellant in support of some of his positions, confirms that Appellant's IIED claim is untenable. There, the court reviewed its prior holdings that a plaintiff's claims of injury such as "nervousness, sleep deprivation, stress and its physical symptoms, withdrawal from activities, and inability to concentrate at work failed to allege the type of extreme emotional distress that is so severe that no reasonable person could be expected to endure it." *Id* at 205. The court found also that defendant's conduct was not outrageous as a matter of law, noting that "the outrageousness requirement 'is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved.'" *Id.* at 204.

In the instant case, as is in the *Harris* case, Appellant is unable to meet the necessary elements of a cause of action for intentional infliction of emotional distress. First, the above-described conduct allegedly undertaken by Dr. KALISH can in no sense be described as outrageous. Even if the conduct could be characterized as rude, it certainly was not outrageous to a point necessary to establish an IIED claim.

Secondly, the injuries and damages which Appellant allegedly sustained cannot reasonably be characterized as so severe that no reasonable person could be expected to endure them. Although Appellant claims he "suffered extreme emotional distress," (CT 0003, ¶ 14; 0004, ¶ 22) in reality he alleged no facts to support those conclusionary allegations. Nor did Appellant include in his declaration in opposition to the anti-SLAPP motion

any facts which would constitute extreme emotional distress (CT 0089-0092). Thus, two of the necessary elements for an IIED claim are unprovable.

Appellant's mere assertion that Dr. KALISH should have known that he was emotionally fragile does not carry the day. Although knowledge of a plaintiff's special susceptibility to emotional distress may be a factor in evaluating the defendant's conduct, "[m]ajor outrage is still essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." *Cochran v. Cochran* 65 Cal.App.4th 488, 496 (1998).

The lower court impliedly found as a matter of law that Appellant had failed to provide evidence sufficient to support a cause of action for intentional infliction of emotional distress.

3. *First Cause of Action for Fraud.*

There is some question as to the scope of Appellant's fraud claim. The complaint alleges that the fraud is based upon three factors: (1) Dr. KALISH represented (through attorney Brubaker) that the examination would not be painful; (2) Dr. KALISH represented (again through attorney Brubaker) that the examination would not be painful or improper; and (3) Dr. KALISH had been hired by defendant Behrouzi (CT 0002). Appellant has apparently abandoned the first two statements, contending now that prior to the examination, Respondent "falsely stated that he had been retained by defendant Behrouzi (in addition to defendant Hunter) to conduct the examination" (OB 12; CT 0086).

As an initial matter, Appellant misstates the record with regard to his contention. The record establishes that Dr. KALISH never told Appellant that he had been retained by defendant Behrouzi. The transcript shows that

the statement was actually: "I've been asked to do a psychiatric evaluation . . . [b]y the attorneys representing the people that you're suing" (CT 0060). Mr. PARKER, himself, confirms that this was the actual statement made by Dr. KALISH (CT 0090-0091).

The record establishes that the statement was true. Dr. KALISH was initially retained as an expert witness by Greg Konoske, counsel for another defendant besides Mr. Behrouzi (CT 0027, ¶ 3). Subsequently, Dr. KALISH was also retained as an expert by Mr. Brubaker, counsel for defendant Hunter (CT 0027, ¶ 4).

Furthermore, the record discloses that Appellant must have known that the mental examination was being performed at the request of defendant HUNTER. Appellant was at all times representing himself in the action, and therefore all pleadings and related documents were served upon him, personally. Among the pleadings served upon him was defendant HUNTER'S notice of motion to compel the psychiatric examination in question, which clearly states that it was defendant HUNTER who was seeking to compel the examination (CT 0046). Moreover, Appellant filed opposition to defendant HUNTER's motion, which opposition clearly identifies defendant HUNTER as the party seeking the examination (CT 0049). Thus, he cannot claim ignorance regarding the party on whose behalf Dr. KALISH was performing the mental examination.

Additionally, Appellant cannot demonstrate that Dr. KALISH intended that he rely upon the statement, or that he justifiably relied upon Dr. KALISH's alleged statement, both of which are essential elements of a cause of action for fraud. *South Tahoe Gas Co. v. Hofmann Land Improvement Co., Inc.* 25 Cal.App.3d 750, 765 (1972). Appellant did not, and cannot, demonstrate that Dr. KALISH had any knowledge of defendant

Hunter's C.C.P. 998 offer, or Mr. PARKER's intended scheme to accept the offer, and continue to proceed against defendant Behrouzi (See OB 12).

On May 20, 2005 Mr. PARKER was ordered by the court to submit to a mental examination (CT 0056). The same day defendant Hunter served a C.C.P 998 offer upon him in the amount of \$21,101.00. The mental examination took place on May 24, 2005 (CT 0089). On June 9, 2005 defendant Hunter served a second C.C.P. 998 offer, in the amount of \$10,701.00 (CT 0076-0077). The second offer was held to have revoked the first by operation of law. Appellant contends based upon Dr. KALISH's statement he was unable to accept a pending offer of judgment as a means of avoiding the examination (OB 12).

Absent from the record, however, is any evidence that Respondent had any knowledge of any pending offers for judgment, or that he intended any of his statements to be relied upon by Mr. PARKER to his damage. Therefore, Appellant was unable to prevail on his claim for fraud.

4. *Fourth Cause of Action for Breach of Contract.*

The fourth cause of action is premised upon an "implied contract" which supposedly resulted from Mr. PARKER's "voluntary" submission to the mental examination in question (CT 0006, ¶ 32). As a matter of law Appellant cannot establish either a contract, or its breach. First, his assertion that he voluntarily submitted to the examination is dispelled by the record on appeal. In actual fact, he resisted the examination, and defendant Hunter was required to obtain a court order compelling Mr. PARKER's attendance (CT 0046; 0049; 0056). Thus, there existed no consideration for the alleged contract.

Secondly, no physician-patient relationship ever existed between

Appellant and Respondent, and no medical treatment was ever provided so as to create such a relationship.

In order to recover in breach of contract, a plaintiff must prove (1) a contract; (2) plaintiff's performance or excuse from performance; (3) defendant's breach; and (4) damages resulting from the breach. *Walsh v. West Valley Mission Com. College Dist.* 66 Cal.App.4th 1532, 1545 (1998). In the context of a contract for medical treatment, a plaintiff must prove both (1) the existence of an express contract in which the doctor clearly promises a particular result or cure; and (2) the patient's reliance on that promise in consenting to treatment. *McKinney v. Nash* 120 Cal.App.3d 428, 442 (1981).

In this case, no evidence existed to support the necessary relationship between the parties, or the existence a any promise by Respondent. The cause of action for breach of contract fails as a matter of law.

**5. *The Fifth Cause of Action for Tortious
Violation of Medical Privacy.***

The fifth cause of action asserts that Appellant suffered injury or damage as a result of Dr. KALISH's disclosure to attorney Brubaker of details of the subject mental examination. Appellant further asserts that such disclosure "was an illegal violation of the privacy of [his] medical records" (CT 0007). The record establishes that no privacy rights existed with respect to the mental examination, and therefore no violation occurred.

It is clear that no physician-patient relationship existed in this case so as to create any duty on the part of Dr. KALISH to maintain confidentiality as to the mental examination. Respondent was retained to examine Mr. PARKER for the very purpose of determining his mental status which was determined to be at issue in the case. As a retained expert witness in the

litigation, Dr. KALISH was bound to testify concerning his findings and opinions from the examination. Such a disclosure by him was a necessary incident to his having been retained as an expert in the case.

Furthermore, the mental examination in question was noticed pursuant to § 2032.610(a). That section allows for the physician's written report to be prepared and distributed to the parties in the litigation.

Therefore, Appellant failed to demonstrate that he could prevail on the cause of action for tortious violation of medical privacy.

V. CONCLUSION

Respondent submits that the lower court's ruling granting the anti-SLAPP motion should be affirmed in all respects. Respondent demonstrated that the litigation privilege was fully applicable to all of the conduct which Dr. KALISH is alleged to have engaged during the subject mental examination. Respondent has also established that Appellant failed to demonstrate a probability of success as to any of the five causes of action alleged in his complaint.

The rule of law which Appellant urges this court to adopt is not supported by any California authority. Furthermore, the adoption of such a rule of law would, as a practical matter, strip medical examiners of the Constitutional right of free speech in litigated cases, allowing a plaintiff in such an action to parse the conduct of a medical examiner as Appellant attempts to do in this case would provide a basis for unlimited litigation on the part of an examinee. Surely, in nearly any conceivable factual scenario, an examinee could select a phrase or identify conduct, incidental to the examination, which was not necessarily required for purposes of the examination. Thus, section 425.16 would be rendered essentially moot.

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For the foregoing reasons, Respondent requests that the court affirm the lower court's ruling, granting the anti-SLAPP motion.

DATED: February 12, 2009

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